Supreme Court of the United States.

No. 553.—October Term, 1905.

Robert Sawyer and Arthur Adams, Plaintiffs in Error, *vs.* The United States.	In error to the Circuit Court of the United States for the Eastern District of North Carolina.

[April 30, 1906.]

The writ of error in this case brings before this court a judgment of conviction of murder, rendered in the Circuit Court of the United States for the Eastern District of North Carolina.

The plaintiffs in error were indicted at the fall term, 1905, of the United States District Court for the Eastern District of North Carolina, Wilmington Division, for the murder, by shooting, on the 28th day of October, 1905, of E. R. Rumill, captain; John T. Hall, mate; John Falbe, cook; C. L. Smith, engineer, and John S. Coakley, seaman, committed on the high seas and within the jurisdiction of the court wherein the indictment was found, and on board of the American vessel called the Harry A. Berwin. The indictment alleged that after the shooting the deceased were thrown into the sea. Upon the trial of the plaintiffs in error in November, 1905, in the United States Circuit Court for the Eastern District of North Carolina, to which court the indictment had been duly transferred for trial, they were convicted of the murder of the first four named in the indictment. The court told the jury that the defendants were not charged with killing Coakley, and if charged in the bill there was no evidence to support the charge.

There is no question made as to the sufficiency of the indictment or of the jurisdiction of the court.

It appeared on the trial that the plaintiffs in error were part of the crew, and, together with one Henry Scott, who was also one of the crew, were the only living persons found on the Berwin, when they were arrested by the crew of a small boat, that was put off from a schooner called the Blanche H. King, which was then proceeding on a voyage up the coast from Brunswick, Georgia, to Philadelphia, Pennsylvania, and had arrived at a point about thirty-two miles southwest from Cape Fear bar. The attention of Captain John W. Taylor of the schooner was directed about nine o'clock in the evening in the month of October, 1905, to a vessel just ahead of him, on account of the manner in which she was carrying her lights, and because she was right in the track of his own vessel. He sent a small boat, manned by several seamen, to the vessel, (which proved to

be the Berwin,) and the boat brought back the plaintiffs in error and Scott, who, on being brought to the deck of the vessel and telling their story, were put in irons by direction of the captain, who then steered his vessel for the nearest port, which was Southport, North Carolina, where the men were delivered to the Federal authorities. Upon the trial of the indictment which was found against the plaintiffs in error, the man Scott was called as a witness, and swore to the murder by the plaintiffs in error while the vessel was at sea, and on or about October 28, 1905.

Scott was subsequently indicted alone for the murders, and was also convicted, the plaintiffs in error being witnesses against him, and they testified that he committed the murders. He has been reprieved by the President, so that he may be again used as a witness against the plaintiffs in error in case of a new trial being granted to them.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The first question to be noticed in this case arises by reason of these facts: When the case was called for trial the clerk proceeded to call the names of the jurors, and the record shows that:

"While the jury was being empaneled several jurors were called, and as each juror appeared he was told by the district attorney to stand at the foot of the panel, without any challenge on the part of the Government and without an opportunity given to defendants to accept, challenge for favor or cause, or to peremptorily challenge any and all of said jurors so stood aside.

"To eac[illegible] and to every action in this respect on the part of the Government the defendants promptly and in due time objected, but the court overruled the objections, saying the State practice would be followed, and there was no United States statute on the subject; to which ruling of the court the defendants, by their counsel then and there duly excepted, and the exceptions were allowed. It appeared that neither the Government nor the defense had exhausted all their peremptory challenges when the jury was empaneled."

The inquiry is, whether the court had the power to permit such conditional challenge by the Government?

The origin of this practice is stated by Mr. Justice Field in delivering the opinion of the court in *Hayes* v. *Missouri*, (120 U. S. 68–71.) It is there said:

"Originally, by the common law, the Crown could challenge peremptorily without limitation as to number. By act of Parliament passed in the time of Edward the First, the right of challenge was restricted to challenges for cause. But, by a rule of court, the Crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury

was not obtained, the Crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them."

The question here involved was not directly before the court in that case, but the accuracy of the statement is not questioned. It is not disputed that the practice has prevailed in the State of North Carolina ever since the foundation of the State, and it has also prevailed in South Carolina and Pennsylvania.

In 1790 Congress provided for granting certain peremptory challenges to the defendant, (1 Stat. 119,) but no peremptory challenge was allowed to the Government.

While the Government was thus situated in regard to peremptory challenges the case of *United States* v. *Marchant*, (12 Wheat. 480,) came before the court. The question directly involved was whether persons jointly charged in the same indictment for a capital offense had a right by law to be tried separately without the consent of the prosecutor, and it was held that persons so jointly charged had not that right, but that such separate trial was a matter to be allowed in the discretion of the court. In the course of the opinion, however, which was delivered by Mr. Justice Story, it was stated as follows:

"But a still more direct conclusion against the right may be drawn from the admitted right of the Crown to challenge in criminal cases, and the practice under that right. We do not say that the same right belongs to any of the States of the Union; for there may be a diversity in this respect as to the local jurisprudence or practice. The inquiry here is, not as to what is the State prerogative, but, simply what is the common law doctrine as to the point under consideration. Until the statute of 33 Edw. I, the Crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the Crown to those for cause shown. But the practice since this statute has uniformly been, and it is clearly settled, not to compel the Crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says (Pl. Cr. b. 2, ch. 43, s. 2, s. 3) if the King challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the King to show cause, presently challenge, *touts paravaile*; yet it hath been adjudged that the defendant shall be first put to show all his causes of challenge before the King need to show any. And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times.

"This acknowledged right of peremptory challenge existing in the Crown before the statute of 33 Edw. I. and the uniform practice which has prevailed since that statute, to allow a qualified and conditional exercise of the same right, if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner; and

that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial he could at any time be defeated by the Crown of such a choice, by its own admitted prerogative."

It is true that the matter involved in the Marchant case did not call for this statement, as the direct question was not in issue. It was made argumentatively, as one reason for denying the right claimed by defendant in that case. Subsequently the Circuit Court of the United States in Pennsylvania, in 1830, followed the views expressed in the Marchant case. (*United States* v. *Porter*, 1 Bald. 78.) In that case the right was claimed by the district attorney and denied by counsel for defendant, but was allowed by the court upon the ground that it considered the opinion of the Supreme Court as a recognition of the qualified right of the United States to challenge, and directed the juror to be put aside until the panel was exhausted, declaring that if that should happen and the juror be again called the United States could not then challenge him without showing cause.

Again, in the case of *United States* v. *Douglass*, (2 Blatch. 207,) which was decided in 1851, this qualified right of challenge was conceded to exist by Mr. Justice Nelson, who presided on the trial in that case, but was denied by District Judge Betts, who sat with him. The case was tried in the Southern District of New York, in which State no such right of conditional challenge existed. A motion for a new trial was made before the same court, and Judge Nelson said in his opinion, in denying the motion, that "this qualified right of challenge without cause is the settled doctrine of the common law, and has been recognized by the Supreme Court of the United States in the case of *United States* v. *Marchant*, (12 Wheat. 480,) and has been practiced upon in some of the circuits." The judge then said that the doubt as to the right of the Government arose by reason of the passage of the act of July 20, 1840, (5 Stat. 394,) providing for the designation of jurors to serve in the Federal courts, and empowering those courts to make rules and regulations for conforming the designation and empaneling of jurors to the laws and usages of the States as they may exist at the time. A rule to that effect had been adopted in the Southern District of New York. The justice further stated in his opinion that the act of 1840 applied only to the mode and manner of drawing or selecting the jury—that is, by ballot, lot or otherwise—as prescribed by the State laws, and that it did not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause; and that those questions stand upon the common law, except where regulated by the act of Congress. Judge Betts, in his opinion, which is set forth in th report, held that no such right existed, certainly not in the States where such practice was not recognized.

In 1855 the case of *United States* v. *Shackelford*, (18 How. 588,) came before the court. It arose on a certificate of difference of opinion between the judges holding the Circuit Court of the United States for the District of Kentucky. The question was whether the defendant, who was indicted for a misdemeanor, was entitled to any peremptory challenges, and, as the judges were divided in opinion, they certified the question of difference to this court. Mr. Justice Nelson, in delivering the opinion of the court, stated that the power conferred upon the Federal courts under the act of 1840, *supra*, enabled those courts to adopt rules and regulations for conforming the designation and empaneling of jurors to the laws and usages in force at the time in that State, and that by virtue of that act the courts were enabled to adopt those laws and usages in respect to challenges of jurors, whether peremptorily or for cause, and in cases both civil and criminal, with the exception therein stated. It was further held that, as the act of 1790, (1 Stat. 119,) gave persons indicted for treason a certain number of peremptory challenges, etc., that act expressly recognized the right of peremptory challenge, and the right should be regarded as excepted out of the power of the courts to regulate the subject by rule or order under the aforesaid act of 1840. Mr. Justice Nelson further observed as to the common law that it "gave to the King a qualified right of challenge in these cases, which had the effect to set aside the juror till the panel was gone through with, without assigning cause, and if there was not a full jury without the person so challenged, then the cause must be assigned or the juror would be sworn." Continuing, he said:

"The court is of opinion that the right of challenge by the prisoner recognized by the act of 1790 does not necessarily draw along with it this qualified right, existing at common law, by the Government, and that, unless the laws or usages of the State, adopted by rule under the act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the State law."

In the case before us the laws or usages of the State permitted this qualified right of challenge by the Government. No case in this court has been cited, nor have we found one, that decides the question now before us. Those which we have referred to, whether of this court or the Circuit Courts of the United States, were at any rate decided before the passage of the act of Congress of 1865, (13 Stat. 500,) amended in some particulars by the act of 1872 (17 Stat. 282.) These statutes gave peremptory challenges to the Government, and the question now presented is whether after Congress has dealt with the subject of such challenges the former qualified right of challenge on the part of the Government still exists in those States where such practice obtains, and the practice has been adopted by a rule of court in the courts of the United States. Section 800 of the Revised Statutes of the United States in substance repro-

duces the act of 1840, above referred to, so that the subject must be considered with reference to that section as well as the statute which gives challenges to the Government.

The question arose in *United States* v. *Butler* (1 Hughes, 457–467.) The trial was held before Chief Justice Waite and Judge Bond in the United States Circuit Court for the District of South Carolina in April, 1877. Upon the empaneling of the jury a juror was called and was examined on his *voir dire*, and was then told by the counsel for the Government to stand aside. The defense objected, and insisted that the prosecution must either exercise the right of challenge or waive it entirely and at once. The court held that this rule was in force when the Government had no right of peremptory challenge, but as the right of peremptory challenge had been given to the prosecution it should be given the same right with the defense and should exercise the right at once or not at all.

This decision of the Federal Circuit Court is the only one brought to our attention that has been decided since the passage of the acts of Congress, giving the right of peremptory challenge to the Government. It was by virtue of the act of 1840, already mentioned, (R. S. sec. 800,) that the Federal courts have been enabled to adopt the laws and usages of the State in respect to the challenging of jurors, whether peremptorily or for cause. (*United States* v. *Shackleford*, 18 How. *supra.*)

When the Federal statute granted the right to a certain number of peremptory challenges to the defendant in criminal cases, it was said that such right must be regarded as excepted out of the power of the court to regulate the same by rule or order under the act of 1840. As the statute prescribed the number of challenges to the defendant, the court could not, therefore, proceed under the act of 1840, and by rule or order prescribe any other number, or none at all, in accordance with the practice of the State courts in that respect. The Federal statute was held to be exclusive of any other regulation on the subject, because to give any other number of challenges to the defendant would be inconsistent with the provisions of the Federal statute, even though the matter of peremptory challenge was provided for by the State practice. In such a case the power to provide by rule of court was to be regarded as excepted from the provisions of the act of 1840.

But, in giving by statute the right of peremptory challenge to the Government in certain cases, it does not necessarily affect the exercise of the power of the Government to challenge in this qualified manner. A conditional or qualified right of challenge is not inconsistent with the existence of the right of peremptory challenge given by statute. The two may co-exist, and the Government may exercise the right of peremptory chal-

lenge given by statute and in the same case exercise the qualified or conditional challenge, as in the case at bar.

It was stated in the opinion in the Shackleford case that unless the laws or usages of the State (adopted by rule by the Federal courts under the act of 1840) allowed it, the right should be rejected, and the practice conformed in that respect to the State law. But in North Carolina the State law permits such qualified right of challenge, and the court in this case made the order to follow the State practice, there being no United States statute on the subject.

In Pennsylvania, which is one of the States where the practice has always obtained, the Supreme Court held that a statute, giving peremptory challenges, does not take away this right of the Government. (*Haines* v. *Commonwealth*, 100 Pa. 317, 322; *Commonwealth* v. *O'Brien*, 140 Pa. 555, 560.)

To the same effect are the decisions in North Carolina. The right remains notwithstanding the enactment of a law giving peremptory challenges to the State. (*State* v. *Benton*, 19 N. C. 196–203; *State* v. *Hensley*, 94 N. C. 1021, [A. D. 1886.])

The courts of Georgia and Florida are of a different opinion. (*Scaley* v. *State*, 1 Ga. 213; *Mathis* v. *State*, 31 Flor. 291, 315.)

We are of opinion that the passage of the acts of Congress, granting peremptory challenges to the Government, has not taken away the qualified right of challenge under discussion in this case. As we have said, there is certainly nothing in the statute granting peremptory challenges to the Government to prevent its exercise of the other kind of challenge when permitted in the State, and where it has been adopted by the Federal court as a rule, or by special order as in this case. The exercise of this right is under the supervision of the court, and it ought not to be permitted to be exercised unreasonably, or so that the interests of the defendant might be unduly prejudiced. The court should take special care to that end.

In this case it appears that neither the Government nor the defendants had exhausted all their peremptory challenges when the jury was obtained. We think it plain that the Government's right of qualified challenge was not unreasonably exercised, and the rights of the plaintiffs in error suffered no injury by the course permitted by the court.

Another question argued arises upon the cross-examination by the district attorney, of the plaintiff in error Adams, who voluntarily became a witness on the trial on his own behalf and in behalf of his fellow-plaintiff in error. The cross-examination referred to the conduct of the witness on a previous voyage and on a different vessel, in regard to which nothing had been said on the examination of the witness in chief.

It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. (*Fitzpatrick* v. *United States*, 178 U. S. 304.)

It is contended on the part of the plaintiffs in error that within this rule the cross-examination was improper, as the subject-matter of the cross-examination had no tendency to connect the prisoner with the alleged crime for which he was on trial.

The district attorney on his cross-examination began with questions relating to the experience which the witness had had as a seaman, and asked him in regard to the vessels that he had sailed on. It appeared that he had been one of the crew, among others, of the schooner Benefit, for some fifteen months, whose captain was a man named Falkner. He was then asked if during the latter part of the fifteen months he was on the schooner he did not have trouble and try to create insubordination on board that vessel. This question was duly objected to by counsel for defendants, and the objection overruled by the court and an exception allowed. He answered that he was not logged, and then stated that the trouble arose from the cook giving them molasses to make tea, which he said was not right, and he and three other men went to the captain and asked him if he thought it was right, and the captain said they did not have sugar and would have to use molasses. The witness took the tea and threw it overboard; that he never went among the men and tried to create dissatisfaction among them; that the captain never threatened to put him in irons, and when he left the Benefit he shipped on another vessel named the Benj. Russell, where he stayed for over three months.

It is unnecessary in this case to inquire whether the cross-examination was within the prescribed limits, because the witness denied that he had any trouble, or that he had ever tried to create any trouble, or that there was any insubordination on his part on board the vessel named. What he said in regard to the facts showed that there was neither trouble nor insubordination. The Government made no attempt to contradict the evidence of the witness on this subject, and hence there could have been no harm arising from the cross-examination. There are some State authorities which hold that the error, if any, is not cured by answer of the witness denying the charge. But we think the better rule is where, as in this case, it is plain that there is no injury, the exception is not available.

The plaintiffs in error also ask for a new trial because of the remarks made by the district attorney in summing up to the jury, and the action of the court thereon.

In the course of his remarks, and in speaking of the fact that during the time these murders were being perpetrated, one of the plaintiffs in error had testified that he drank some coffee, the district attorney said, "A man under such circumstances who would drink coffee ought to be hung on general principle." This remark the counsel for the plaintiffs in error objected to, and, after hearing counsel on the objection, the court directed the district attorney to confine himself to a proper argument, and thereupon the district attorney expressed his regret if he had made an improper argument, and withdrew the remark.

When the objection was first made by counsel for the plaintiffs in error the court asked if he wanted to cut the district attorney off from making any argument, but thereupon the court immediately directed the district attorney to confine himself to a proper argument, as above stated.

Counsel for the plaintiffs in error objected to both the remarks of the district attorney and the comments of the court as made, and counsel asked to be allowed to file an exception. Upon this request the court replied, "I will give counsel the benefit of his statement that he has made an exception which the court considers frivolous."

The remark of the district attorney was not appropriate argument and should not have been made, but we see nothing more that could have been done than was done by the court as soon as the objection was made by the counsel for the plaintiffs in error. Counsel in summing up to a jury are under some excitement, and may naturally make a remark or statement which is improper. But there is not on that account any ground laid for setting aside a verdict where, as in this case, the court held it was improper, and the counsel withdrew and apologized for it. (*Dunlop* v. *United States*, 165 U. S. 486–498.) Under such circumstances it does seem as if the exception were frivolous, and the court in stating its opinion to that effect is not open to censure.

The error assigned that the court said the plaintiffs in error were not charged with the murder of Coakley, when in fact the bill contained his name, has not been pressed, and we think there is no merit in it. The court said that if charged in the bill there was no evidence to support such charge. Certainly no harm was thereby done the plaintiffs in error.

Upon full consideration of all the objections urged by counsel for the plaintiffs in error, we think no ground appears for granting a new trial. The judgment is

Affirmed.

Mr. Justice WHITE dissented.